

THE HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

UNIVERA, INC., a Delaware corporation,

Plaintiff,

v.

JOHN TERHUNE, an individual; TERHUNE  
ENTERPRISES, LLC, a Florida limited  
liability company; MARSHALL DOUGLAS,  
an individual; DOUGLAS ENTERPRISES  
INTERNATIONAL, LLC, a Florida limited  
liability company,

Defendants.

No. C09-5227 RBL

ORDER GRANTING IN  
PART AND DENYING IN  
PART PLAINTIFF'S  
MOTION FOR PARTIAL  
SUMMARY JUDGMENT  
TO COMPEL  
ARBITRATION

THIS MATTER is before the Court for consideration of Plaintiff's Motion for Partial Summary Judgment to Compel Arbitration [Dkt. #45]. The Court has reviewed the materials in support of and opposition to the motion. For the following reasons, Plaintiff's motion is GRANTED IN PART and DENIED IN PART.

**Background**

Plaintiff Univera asks this Court to compel defendants John Terhune, Marshall Douglas, Terhune Enterprises, LLC ("Terhune Enterprises"), and Douglas Enterprises International, LLC ("Douglas Enterprises"), into arbitration based on the existence of a valid and enforceable arbitration clause.

1 In 2004, both Terhune Enterprises, Inc. (now Terhune Enterprises, LLC) and Douglas Enterprises  
2 International, LLC, became Univera Associates.<sup>1</sup> Univera requires its Associates to renew their  
3 agreements with Univera for each calendar year. The form includes a statement that the Associate has  
4 “read and accept[ed] all of the terms and conditions as outlined in the company’s policies and procedures  
5 manual.” On the reverse side of the form, the agreement includes the following clause:

6 Any controversy or claim arising out of or relating to the Associate Agreement, or any  
7 alleged breach thereof, shall be settled by arbitration administered by the American Bar  
8 Association under its Commercial Arbitration Rules... If an Associate files a claim or  
9 counter-claim against Oasis, he or she may only do so on an individual basis and not with  
10 any other Associate or as part of a class or consolidated action.

11 As of December 2008, the Univera policies and procedures manual required any arbitration to take  
12 place in Seattle, Washington.<sup>2</sup> The manual also included a provision entitling the prevailing party in any  
13 such arbitration to costs and expenses of arbitration, including attorney’s fees and filing fees.

14 On the Terhune 2005 renewal form, the Associate Agreement lists Terhune Enterprises as the  
15 “Associate”. It was signed by “Patricia Terhune, VP.” On the Douglas 2004 Associate Agreement form,  
16 the “Associate” is listed as Douglas Enterprises International, LLC. The form was signed by Marshall  
17 and Diana Douglas, Directors. In January 2009, John Terhune resigned as a member of Terhune  
18 Enterprises, LLC. In February 2009, Marshall Douglas resigned as a member of Douglas Enterprises  
19 International, LLC. Univera alleges that Mr. Terhune, Mr. Douglas, Terhune Enterprises, and Douglas  
20 Enterprises violated Univera’s policies and procedures, and as such should be compelled to arbitrate the

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21 <sup>1</sup>In 2004, Univera conducted business under the name Oasis Lifesciences.

22 <sup>2</sup>15.2 of the Univera Policies and Procedures Manual states:

23 A. Any controversy or claim arising out of or relating to the Associate Agreement, these  
24 Policies and Procedures, or the breach thereof, the Associate’s business or any dispute  
25 between Univera and the Associate, shall be settled by binding arbitration administered by the  
26 American Arbitration Association under its commercial arbitration rules .... Any such  
27 arbitration shall be held in Seattle, Washington, USA....

28 B. If an Associate files a claim or counterclaim against Univera, he or she may only do so on  
an individual basis and not with any other Associate or as part of a class or consolidated  
action....

C. The prevailing party in any such arbitration shall be entitled to receive from the losing  
party all costs and expenses of arbitration, including attorney’s fees and filing fees....

1 disputes between the parties. This Court GRANTS IN PART and DENIES IN PART the plaintiff's  
2 Motion to Compel Arbitration. Terhune Enterprises, LLC, and Douglas Enterprises International, LLC,  
3 are compelled to arbitrate with Univera. Mr. Terhune and Mr. Douglas did not personally enter into any  
4 agreement with Univera, and cannot be compelled to arbitration on the basis of the arbitration clause.

### 5 **Discussion**

6 The Federal Arbitration Act ("FAA") provides that any arbitration agreement within the scope of  
7 the parties' agreement is valid, irrevocable, and enforceable. The FAA leaves the Court no room for  
8 discretion, but requires the Court to "direct the parties to proceed to arbitration on issues as to which an  
9 arbitration agreement has been signed." *Chiron Corp. v. Ortho Diagnostic Sys.*, 207 F.3d 1126, 1130 (9<sup>th</sup>  
10 Cir. 2000) (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218 (1985)). Under the FAA, the  
11 Court must first determine whether or not a valid agreement to arbitrate exists. *Chiron*, 207 F.3d at 1130.  
12 If an agreement exists, the Court then examines whether that agreement encompasses the dispute at issue.  
13 *Id.*

#### 14 **A. Existence of an agreement to arbitrate**

15 Univera entered into Associate Agreements with both Terhune Enterprises and Douglas  
16 Enterprises. The Associate Agreements included an arbitration clause, and required the Associates to be  
17 bound by Univera's policies and procedures manual. An agreement to arbitrate exists between Univera  
18 and the LLCs.

19 Univera also seeks to compel John Terhune and Marshall Douglas individually to arbitration. Mr.  
20 Terhune and Mr. Douglas were both officers of their respective LLCs until early 2009. Mr. Douglas  
21 signed an Associate Agreement in 2004 as "Marshall Douglas, Director." In addition, Mr. Douglas  
22 signed a Business Registration Form in conjunction with the Douglas Enterprises Associate Agreement.  
23 The form was signed on the line indicated for "President." Mr. Terhune's signature does not appear on  
24 Terhune Enterprises' 2005 renewal form, but he was an officer of the company at the time. Neither Mr.  
25 Terhune nor Mr. Douglas signed the Associate Agreement in their individual capacity. The question of  
26 whether a non-signatory to an arbitration agreement may be compelled to arbitration is governed by  
27 federal law. *Letizia v. Prudential Bache Sec., Inc.*, 802 F.2d 1185, 1187 (9th Cir. 1986).

1           **1.       Estoppel**

2           Univera argues that Mr. Terhune and Mr. Douglas may be compelled to arbitrate under a theory of  
3 equitable estoppel. Non-signatories of an arbitration agreement may be bound by the agreement under  
4 ordinary principles of contract and agency law. *Comer v. Micor, Inc.*, 436 F.3d 1098, 1101 (9<sup>th</sup> Cir. 2006)  
5 (quoting *Letizia*, 802 F.2d at 1187). Under an equitable estoppel theory, a signatory to an arbitration  
6 agreement cannot compel a non-signatory into arbitration unless the non-signatory knowingly exploits the  
7 agreement containing the arbitration clause. *Comer*, 436 F.3d at 1101. Theories of alternative estoppel  
8 advanced by Univera are not applicable to this case, as they only apply where a non-signatory seeks to  
9 compel a signatory to arbitrate. *See Merrill Lynch Inv. Managers v. Optibase, Ltd.*, 337 F.3d 125, 131 (2d  
10 Cir. 2003); *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 779 (2d Cir. 1995).

11           Equitable estoppel precludes a party from simultaneously enjoying the benefits of a contract while  
12 avoiding the obligations imposed by that contract. *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042,  
13 1045 (9th Cir. 2009). In order to compel arbitration under an equitable estoppel theory, a non-signatory  
14 must have either received a direct benefit or must have relied on the contract containing the arbitration  
15 clause. *See Thomson-CSF, S.A.*, 64 F.3d at 778-79.

16           While Mr. Terhune and Mr. Douglas earned money through their LLC's contracts with Univera,  
17 they have not received the type of direct benefit necessary to compel them to arbitration as a non-  
18 signatory to the Associate Agreement. Instead, Mr. Terhune and Mr. Douglas are indirect beneficiaries  
19 who did not knowingly exploit the Associate Agreement. Mr. Terhune and Mr. Douglas acted in their  
20 official capacities as company officers throughout their relationship with Univera. The Florida Action  
21 brought by the defendants includes claims based on the Associate Agreement. These claims were brought  
22 only by the LLCs, not by Mr. Terhune or Mr. Douglas individually. The claims brought individually by  
23 Mr. Terhune and Mr. Douglas are based on common law tort principles, including tortious interference,  
24 unfair competition, and defamation. None of these causes of action shows that Mr. Terhune or Mr.  
25 Douglas "knowingly exploited" the Associate Agreement that their respective LLCs had with Univera.  
26 Mr. Terhune and Mr. Douglas cannot be compelled to arbitration under an estoppel theory.  
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1           **2.       Veil Piercing**

2           Univera argues that Mr. Terhune and Mr. Douglas must be compelled to arbitrate because there is  
3 a possibility that the Court might pierce their respective LLC's corporate veils. In order to compel  
4 arbitration because the defendants have disregarded corporate separateness, there must be more than a  
5 mere possibility that the veil will be pierced. *See Carpenters 46 v. ZCon Builders*, 96 F.3d 410, 414-415  
6 (9<sup>th</sup> Cir. 1996). Univera fails to meet its burden of proving that Mr. Terhune or Mr. Douglas have  
7 disregarded the separation between themselves and their respective LLCs. They maintained separate  
8 personal and business bank accounts, filed annual reports and corporate tax returns, and may have  
9 received payments for travel reimbursements personally only because Univera issued those  
10 reimbursements to them personally. Univera has failed to show that either Mr. Terhune or Mr. Douglas  
11 has become the alter ego of his respective LLC, and cannot compel them to arbitrate by piercing the  
12 corporate veil at this juncture.

13           **B.       Whether the dispute is encompassed by the arbitration clause**

14           The arbitration clause between Univera and its Associates is very broad, binding the parties to  
15 arbitrate any claim or controversy arising out of or relating to the Associate Agreement or Univera's  
16 Policies and Procedures Manual. Univera alleges impermissible recruiting activities on the part of  
17 Terhune Enterprises and Douglas Enterprises. This claim is within the scope of a valid arbitration clause  
18 with respect to Terhune Enterprises and Douglas Enterprises International. Univera's claims are not  
19 within the scope of a valid arbitration clause with respect to the individual defendants because there is no  
20 valid arbitration clause.

21           **C.       Unconscionability**

22           Defendants argue that Univera's arbitration clause is unconscionable and unenforceable.  
23 Generally applicable defenses to contractual obligations, including unconscionability, may be applied to  
24 invalidate an agreement to arbitrate without undermining the Federal Arbitration Act. *Doctor's Assocs.,*  
25 *Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). Washington state law controls the Court's analysis of  
26 unconscionability. *See Hoffman v. Citibank*, 546 F.3d 1078, 1082 (9th Cir. 2008). Washington  
27 recognizes both procedural and substantive unconscionability. *McKee v. AT&T Corp.*, 164 Wash.2d 372,  
28 396, 191 P.3d 845, 857 (2008). Substantive unconscionability "involves those cases where a clause or

1 term in the contract is one-sided or overly harsh.” *Id.* Washington courts have previously recognized that  
2 the commercial nature of the contract should be considered when examining a potentially unconscionable  
3 clause or contract. *See Luna v. Household Fin. Corp. III*, 236 F. Supp. 2d 1166, 1183 (W.D. Wash.  
4 2002); *MA Mortenson Co., Inc. v. Timberline Software Corp.*, 140 Wash.2d 568, 587, 998 P.2d 305, 314-  
5 15 (2000).

6 Defendants argue that three specific clauses are unconscionable: (1) requiring arbitration to be  
7 held in Seattle; (2) limiting claimants to bringing only individual claims; and (3) the “loser pays all”  
8 clause, including all arbitration expenses. Defendants rely on *McKee* and *Ingle v. Circuit City Stores,*  
9 *Inc.*, 328 F.3d 1165 (9th Cir. 2003), to support their argument that Univera’s arbitration clause is  
10 unconscionable. In *McKee*, the Washington Supreme Court held that a class action waiver was  
11 unconscionable where small claims were involved. *McKee*, 164 Wash.2d at 397-98. The *McKee* Court  
12 also held that a “loser pays all” clause is substantively unconscionable where it applies only to one side.  
13 *Id.* at 399-400. Neither of these circumstances are present here. First, the claims involved in this case are  
14 not small enough to render the class action prohibition substantively unconscionable. Unlike *McKee*, no  
15 small claims are involved. Second, the “loser pays all” clause applies to both sides. If the defendants  
16 prevail at arbitration, Univera will bear all costs under the agreement. In *McKee*, the loser pays clause  
17 applied only to the consumer claimants and attempted to limit what type of damages an arbitrator could  
18 award. *Id.* Here, the clause applies equally to both sides.

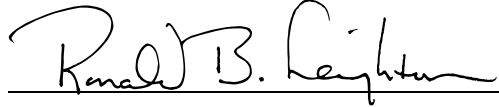
19 Under Washington law, forum selection clauses are prima facie valid absent a showing of  
20 unreasonableness or fraud by the party challenging the clause. *See Dix v. ICT Group, Inc.*, 160 Wash.2d  
21 826, 834-35, 161 P.3d 1016, 1020-21 (2007). A forum selection clause may be invalidated if (1) it was  
22 induced by fraud; (2) the selected forum would be so unfair that it would effectively deprive a party of  
23 their day in court; or (3) enforcement of the clause would contravene Washington state public policy. *Id.*  
24 at 834. Neither party alleges any fraud in relation to the arbitration clause. The defendants have not cited  
25 any public policy that would be violated by arbitrating in Seattle. While the defendants will likely  
26 experience inconvenience in a Seattle arbitration, that inconvenience does not rise to the level of  
27 depriving  
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1 them of their day in court. Accordingly, because the defendants have not met their burden of showing  
2 that the forum selection clause is unconscionable, it is valid and enforceable with regard to the parties to  
3 the agreement.

4 **Conclusion**

5 For the foregoing reasons, Plaintiff's Motion for Partial Summary Judgment to Compel  
6 Arbitration [Dkt. #45] is GRANTED with respect to defendants Terhune Enterprises, LLC, and Douglas  
7 Enterprises International, LLC. Plaintiff's Motion to Compel Arbitration is DENIED with respect to  
8 defendants John Terhune and Marshall Douglas individually. The Court hereby STAYS all proceedings  
9 in this Court with respect to Plaintiff's continuing claims against John Terhune and Marshall Douglas  
10 pending arbitration between Univera, Terhune Enterprises, LLC, and Douglas Enterprises LLC.

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12 DATED this 18<sup>TH</sup> day of November, 2009.

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16 RONALD B. LEIGHTON  
17 UNITED STATES DISTRICT JUDGE  
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